Filed 2/4/05 P. v. Li CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ZHI XIN LI, Defendant and Appellant.	H025403 (Santa Clara County Super. Ct. No. EE016384)

STATEMENT OF THE CASE

A jury convicted defendant Zhi Xin Li of conspiracy to commit pimping. (Pen. Code, §§ 182, subd. (a)(1), 266h, subd. (a).)[1] The court denied probation and imposed a three-year prison term. On appeal from the judgment, defendant claims the trial court erred in excluding the testimony of an alleged co-conspirator, inadequately responding to a question from the jury, and finding defendant ineligible for probation. Defendant further claims that the prosecutor was guilty of misconduct during rebuttal, and defense counsel failed to provide effective assistance in connection with the court's denial of probation.

Defendant has also filed a petition for a writ of habeas corpus, which we ordered considered with his appeal. In it, he alleges ineffective assistance of counsel based on

[1] All further statutory references are to the Penal Code unless otherwise specified.

counsel's failure to (1) request an instruction more responsive to the jury's question and (2) to object to the court's finding of probation ineligibility.

We reverse the judgment and remand the case for resentencing.

By separate order, we deny defendant's petition for a writ of habeas corpus.

FACTS

In early October 2000, Detective Scott McDowell, who worked in the vice and narcotics units of the Sunnyvale Police Department, was reviewing newspaper ads for local massage parlors. He called a number listed in three ads and was given a location at 655 Fair Oaks, Apartment J-317. Detective McDowell learned that defendant had rented the apartment on September 16, 2000, for a single tenant. Detective McDowell and other officers organized an undercover investigation. On October 26, 2000, he made an appointment for a $60 massage. At the apartment, a woman named Nana Shi greeted him. Her boss, Li Bin Chen, was sitting on couch in the living room. Shi led Detective McDowell to a bedroom, and he gave her $60, which she took back to Lo Bin Chen. She returned and massaged Detective McDowell's neck and back. She then asked if he wanted anything else. He replied, " 'Full service,' " which is code for sexual intercourse. She said it would cost $120 more. McDowell gave her the money, and she took it to Lo Bin Chen. McDowell then gave a bust signal to the officers outside the apartment.

Detective Gary Vierra was inside a laundry room down the hall from the apartment when Detective McDowell first entered it. From there he could see outside and observed David Chen park his van and enter the building. Later, he saw Chen and defendant approach the apartment door. Chen had a key. After the bust signal was given, defendant and Chen were detained.

Police searched the apartment and found ledgers, money, condoms, lotion, a lease for another apartment signed by defendant, and two videotapes recorded that day. One tape showed defendant in the living room of the apartment from 10:47 a.m. to 12:42 p.m. During this period, Shi undresses in front of him. Later, someone delivers white towels.

Still later, while defendant was in the living room, a man enters and Shi leads him to a bedroom, and then Shi returns and gives cash to Li Bin Chen. The second tape shows defendant, Shi, and Chen folding towels in the living room. Later, Lo Bin Chen goes to a bedroom, and a man leaves it. Both tapes record telephone calls in English regarding massages.

Police also searched Chen's van and found cash, over 100 condoms; various utility bills for the apartment in defendant's name, an $1,100 check from Chen to defendant, stamped insufficient funds; a rental agreement for Villa Serra Apartments signed by Chen; a checkbook, reflecting checks written by Chen to Villa Serra Apartments, Redwood Plaza apartments, and Gardens of Fountainbleu Apartments.

Shi told Detective McDowell she had been working as a prostitute in the apartment for a week, charging $120, of which $20 went to her boss. Defendant also spoke to Detective McDowell. At first he lied, saying a friend named Steve from Los Angeles rented the apartment in defendant's name using defendant's identification. Later, he admitted renting the apartment for David Chen. He said he lied because he was afraid of Chen. Defendant explained that he had known Chen for only two or three months and agreed to rent the apartment for Chen because Chen said he had already rented too many other places. In exchange, Chen agreed to pay him $1,700 per month. Defendant knew the apartment was used for massages, and he himself had paid for a massage there. Although defendant knew that Chen was associated with an apartment at Heritage Park where massages and sex were sold, he denied knowing that the Fair Oaks apartment was used as a brothel.[2] Defendant said that three weeks before the bust, Chen gave him a check for $1,100, and one week before the bust, Chen paid him $1,500 for rent.

[2] Detective McDowell testified that on November 3, 2000, he observed defendant, Chen, and a woman walking away from the Heritage Park apartments.

Terri Casson, the property manager at Heritage Park apartments identified a six-month rental agreement and various addendums to it, which showed that defendant rented an apartment there beginning on October 11, 2000.

Detective Vierra testified as an expert on the business of prostitution. Given the evidence, he opined that the Fair Oaks apartment was a house of prostitution. He explained that massage parlors are often used as "fronts" for prostitution, and owners often claim they were unaware that sex was being sold. He testified that the Fair Oaks apartment was not a licensed massage parlor, it lacked any massage tables, and neither Nana Shi nor Li Bin Chen were licensed massage therapists.[3]

EXCLUSION OF DAVID CHEN'S TESTIMONY

At trial, defense counsel made an offer of proof concerning the proposed testimony of David Chen. According to counsel, Chen would testify that he asked defendant, whom he had known for a year, to sign rental agreements at the Fair Oaks and Heritage Park apartments because he was having credit problems. He did not tell defendant that the Fair Oaks apartment would be used for prostitution or agree to pay him $1,500 for rent. He would also testify that he intended the Heritage Park apartment to be his residence. Counsel stated that although Chen would fully explain his role in the activities at those two apartment, counsel would object to questions about any other locations and apartments.

The prosecutor argued against such a limitation, stating that he would seek to impeach Chen by cross-examining him about apartments Chen had rented in Sunnyvale, Cupertino, and Fremont. He also wanted to impeach Chen's denial of a conspiracy by questioning him about the scope of his operation, how prostitutes were acquired,

[3] The prosecutor originally charged defendant, Chen, and Li Bin Chen with various offenses, including conspiracy. Defendant's case was severed.

defendant's role in the Fair Oaks apartment operation, and his role in acquiring other properties.

The court indicated that it would not limit cross-examination as requested by the defense. However, the court was concerned that Chen might legitimately assert his Fifth Amendment privilege against self-incrimination during cross-examination.[4] Consequently, the court had Chen testify outside the presence of the jury to determine whether he would assert his rights.

When questioned by defense counsel, Chen admitted running a brothel at the Fair Oaks apartment. He denied doing so anywhere else. He said he lived at the Villa Serra Apartments for several months and then sublet to a woman. He denied supplying her with condoms. From there, he moved to an apartment in Fremont because rents there were lower. He had a friend sign the lease because he was not sure he wanted to live there and was also busy setting up a business in Los Angeles. After a month or two, he moved to Gardens of Fountainbleu with three other people. He stayed there for a few months. He moved out because he started the operation at the Fair Oaks apartment and moved into an apartment at Heritage Park. He said he did not sign a lease because he had a bad credit report. However, he admitted he had cash and at times thousands of dollars in a bank account. He also admitted that he had leased a van but said a friend cosigned for him.

Chen said he did not get involved in prostitution until after defendant rented the Fair Oaks apartment. However, he asserted his Fifth Amendment privilege when asked questions concerning whether (1) he placed any ads in newspapers before defendant rented the Fair Oaks apartment and whether he wrote various checks to different newspapers; (2) whether he was renting other apartments at the same time as the Fair Oaks and Heritage Park apartments; (3) whether defendant previously helped him rent a

[4] Before trial, Chen was convicted of pimping at the Fair Oaks apartment. Because cross-examination might provide a basis for further prosecution against Chen, the court appointed counsel for him.

unit at the Green Valley Apartments; (4) whether he kept moving between apartments to stay ahead of the police; (5) whether he kept condoms in his van because he needed to distribute them to other locations; and (6) whether other people assisted him in managing other brothels.

The prosecutor argued that Chen was avoiding pertinent and relevant questions concerning his involvement in other apartments, the purpose of those apartments, and the involvement of others in his prostitution business. He was also avoiding questions about ads he had placed in newspapers and checks written for those ads. Defense counsel argued that Chen testified about a variety of places and fully answered all relevant and material questions related to the case. The court agreed with the prosecution and excluded Chen's testimony, finding that his assertion of privilege, although legitimate, would unfairly restrict cross-examination.

Defendant contends that the court erred. He argues that the proposed cross-examination related only to "collateral" and "immaterial" matters. Moreover, he argues that even if some remedy were appropriate, the court should have adopted a less drastic one.

In a criminal case, the People have a constitutional right to due process (Cal. Const., art. I, § 29), which necessarily includes the right to full and effective cross-examination of defense witnesses. (See *Chambers v. Mississippi* (1973) 410 U.S. 284, 294 [cross-examination essential component of due process]; *Rinaker v. Superior Court* (1998) 62 Cal.App.4th 155, 165 [same].) When possible, the trial court should give counsel wide latitude during cross-examination. (*People v. Belmontes* (1988) 45 Cal.3d 744, 780.) Thus, when a witness, even a defendant, takes the stand, cross-examination is not confined to " 'a mere categorical review of the matters, dates or times mentioned in the direct examination. . . . It may be directed to the eliciting of any matter which may tend to overcome or qualify the effect of the testimony given by him on his direct examination.' [Citations.]" (*People v. Shader* (1969) 71 Cal.2d 761, 770-771,

fn. omitted.) "[T]he People may 'fully amplify [the defendant's direct] testimony by inquiring into the facts and circumstances surrounding his assertions, or by introducing evidence through cross-examination which explains or refutes his statements or the inferences which may necessarily be drawn from them.' " (*People v. Dimitrov* (1995) 33 Cal.App.4th 18, 34.)

Accordingly, "[i]t is well established that a witness . . . may not testify voluntarily about a subject and then invoke the privilege against self-incrimination when questioned about the details. [Citation.] . . . [Citation.] . . . [¶] . . . A witness may not pick and choose what aspects of a particular subject to discuss without casting doubt on the trustworthiness of the statements and diminishing the integrity of the factual inquiry." (*Mitchell v. United States* (1999) 526 U.S. 314, 321-322.) Furthermore, the credibility of witnesses is always a material issue at trial, and the chief purpose of cross-examination is to test credibility. (See *People v. Carpenter* (1999) 21 Cal.4th 1016, 1049; *People v. Hawkins* (1995) 10 Cal.4th 920, 951; *Fost v. Superior Court* (2000) 80 Cal.App.4th 724, 733.) However, a witness who asserts his or her privilege on cross-examination may prevent the jury from gleaning the facts and determining the witness's credibility. (*Fost v. Superior Court, supra*, 80 Cal.App.4th at p. 736.)

Therefore, when a witness testifies to various matters on direct and then asserts his or her privilege during cross-examination to avoid questions that could impeach material statements and test credibility, the trial court must determine how to proceed. (See *People v. Lucas* (1995) 12 Cal.4th 415, 454; *People v. Lopez* (1999) 71 Cal.App.4th 1550, 1554.) In this regard, courts have long enjoyed discretion to strike some or all of the witness's direct testimony. (*People v. Price* (1991) 1 Cal.4th 324, 421; *Fost v. Superior Court, supra,* 80 Cal.App.4th at p. 735; *People v. Apodaca* (1993) 16 Cal.App.4th 1706, 1716; *People v. Daggett* (1990) 225 Cal.App.3d 751, 760; *People v. Abner* (1962) 209 Cal.App.2d 484, 489; *People v. Robinson* (1961) 196 Cal.App.2d 384, 390; *People v. McGowan* (1926) 80 Cal.App. 293, 297-299.)

Defendant wanted Chen to testify because he would imply that he was solely and completely in control of the prostitution business, and defendant was merely an initial means to Chen's ultimate goal. Thus, it would bolster the defense that defendant never knew that Chen intended to run and then ran a brothel. According to defendant, "Chen's testimony would have been direct evidence, from the 'horse's mouth,' that Chen withheld from [defendant] the nature of the business he was running at Fair Oaks . . . ."

Chen proposed to testify on direct that he had known defendant for a year, but he was not engaged in prostitution before defendant rented the Fair Oaks apartment. The questions the prosecutor wanted to ask Chen were not, in our view, about *collateral* and *irrelevant* matters. Questions about when he placed and paid for the ads in newspapers, how many apartments he rented simultaneously, who else was using those rentals, and why he kept moving from apartment to apartment, would have helped reveal whether Chen had been involved in prostitution *before* defendant rented the apartment for him. Thus the proposed cross-examination would have directly tested Chen's credibility and the truth of his most important assertion. As such, full and effective cross-examination would have helped the jury assess defendant's claim that he did not know about Chen's plans when defendant rented the apartment.

Defendant cites *United States v. Lord* (9th Cir. 1983) 711 F.2d 887 to support his claim that the questions here focused on collateral and irrelevant matters. In *Lord*, the defendant was convicted of distribution and conspiracy to distribute drugs. The primary witness against him was a police informant. At trial, his defense was entrapment. A defense witness testified on direct that the informant had badgered people for drugs, and she had introduced the informant to drug dealers. On cross-examination, however, she invoked her privilege and declined to provide the names of any drug dealers. (*Id*. at pp. 888-889.) The trial court struck her testimony. The appellate court deemed this to be error, albeit harmless, because the names of supposed drug dealers were irrelevant and collateral. (*Id*. at p. 892.) Here, on the other hand, cross-examination concerning Chen's

activities and other apartments and whether he was involved in prostitution at those locations was relevant to the truthfulness of his assertion about when he entered the prostitution business, an assertion defendant considered highly relevant to his defense.

In our view, the trial court reasonably concluded that if it admitted Chen's direct testimony but allowed him to assert his privilege as he did outside the presence of the jury, the prosecutor's right to full and effective cross-examination would be unreasonably restricted, and the defendant would be able to unfairly insulate Chen's credibility and direct testimony from legitimate scrutiny and impeachment. Under the circumstances, therefore, the trial court properly determined that some remedy was appropriate.

The question becomes whether the court erred as a matter of law in not selecting a remedy less drastic than the exclusion of Chen's testimony.[5] (See *Fost v. Superior Court, supra*, 80 Cal.App.4th at pp. 735-736 [less drastic solutions should be considered]; *People v. Hecker* (1990) 219 Cal.App.3d 1238, 1248 [same]; *People v. Reynolds* (1984) 152 Cal.App.3d 42, 47 [same].) Defendant argues that the court should have admitted Chen's direct testimony and then allowed the jury to draw a negative inference from his refusal to answer questions. However, the trial court reasonably could decline to adopt this approach. Indeed, it could be misleading. The prosecutor might appear to be badgering Chen with leading questions; and the jury might decline to draw any inference from Chen's refusal to answer. Moreover, the court could find that the effect of a possible, unspecified inference would not sufficiently ameliorate the loss of full and

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[5] We reject defendant's claim that the court failed to *consider* a less drastic remedial measure. In exercising its discretion, the court was not required to state on the record why it selected exclusion over other possible remedies, and defendant does not point to anything other than the silence of the record to suggest that the court did not consider other options. Under the circumstances, we do not presume that the court failed to properly exercise its discretion. (See Evid. Code, § 664 [presumption official duty is properly performed]; cf. *People v. Gillispie* (1997) 60 Cal.App.4th 429, 434 [where no affirmative error in exercising discretion to dismiss a strike appears on the record, court is presumed to have correctly applied the law].)

effective cross-examination. We further note that Chen did not propose to testify that he never mentioned his prostitution business to defendant after he established it. And, as noted, defendant knew that Chen was selling massages and sex at a different location, and defendant had paid for a massage at the Fair Oaks apartment. Under the circumstances, the court could find that Chen's testimony was not so crucial to the defense and its exclusion not so incurably harmful that some lesser remedy was required to protect the fairness of defendant's trial.

In general, a court abuses its discretion when it acts in an arbitrary, capricious, or patently absurd manner resulting in a manifest miscarriage of justice. (*People v. Suon* (1999) 76 Cal.App.4th 1, 4.) Here, defendant has failed to show that the court abused its discretion in excluding Chen's testimony.

RESPONSE TO THE JURY'S QUESTION

Defendant contends that the court inadequately responded to a question from the jury during its deliberations.

Section 1138 requires a court to give jurors any desired information on any point of law arising in the case and "imposes a 'mandatory' duty to clear up any instructional confusion expressed by the jury. [Citations.]" (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1212.)

Here the jury asked, "If the defendant came to know that prostitution was going on later, rather than when he rented the apartment for Mr. David Chen, does his failure to stop the illegal activities constitute propensity to commit conspiracy even though it's after the fact?"

In response, the court reread all of the conspiracy instructions. (See CALJIC Nos. 6.10, 6.11, 6.12, 6.13, 6.16, 6.17, 6.18.) Over defense counsel's objection, the court also instructed the jury for the first time on withdrawal from a conspiracy, stating, "A member of a conspiracy is [liable] for the acts and declarations of his co-conspirators until he effectively withdraws from the conspiracy, or the conspiracy has terminated. [¶] In order

to effectively withdraw from a conspiracy, there must be an affirmative and good faith rejection or repudiation of the conspiracy which must be communicated to the other conspirators of whom he has knowledge. [¶] If a member of a conspiracy has effectively withdrawn from the conspiracy he is not thereafter [liable] for any act of the co-conspirators committed after his withdrawal from the conspiracy, but his is not relieved of responsibility for the acts of his co-conspirators committed while he was a member." (See CALJIC No. 6.20.)

In addition, the court reminded jurors not to infer that any particular instruction applied simply because it was given. Rather, the applicability of an instruction depended on the facts that the jury found, and therefore jurors should disregard instructions which apply to facts they do not find. (See CALJIC No. 17.31.)

Defendant argues that the court should not have instructed on withdrawal from a conspiracy because the jury's question indicated some confusion related to *formation* of a conspiracy. Defendant asserts that the court should have clarified that confusion by instructing the jury that "mere knowledge that a crime is being committed and the failure to prevent it does not suffice to prove a conspiracy."

I. *The Withdrawal Instruction*

After responding to the jury's question, the court opined that it was not "particularly well written." The court said it was not clear the jurors were asking about "withdrawal." However, "when they talk about does [defendant's] failure to stop the illegal activities constituted propensity to commit conspiracy there is an argument that they're looking at whether he withdrew by just letting things go on." Thus, "the question from the jury can be read to ask about that area[,] and the court is giving it along with all the other instructions . . . ."

Because the court thought the jury might be asking about withdrawal from a conspiracy, it was proper to provide a legally correct instruction explaining that concept. In this regard, we note that "[a] trial judge's superior ability to evaluate the evidence

renders it highly inappropriate for an appellate court to lightly question [a] determination to submit an issue to the jury." (*People v. McKelvy* (1987) 194 Cal.App.3d 694, 705.) Conversely, if the jurors were not asking about withdrawal, then giving the instruction was harmless. The court warned the jury against inferring facts or views on the case from what the court said or did. Moreover, the court twice informed jurors that not all instructions were necessarily applicable, and giving an instruction does not imply that it is applicable. (CALJIC No. 17.31.) We presume that jurors follow the court's instructions. (See *People v. Hardy* (1992) 2 Cal.4th 86, 208; *People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17.) Thus, we do not find it reasonably probable the jury would have reached a more favorable verdict had the withdrawal instruction not been given. (See *People v. Watson* (1956) 46 Cal.2d 818, 836.)

II. ***Adequacy of the Court's Response***

The record supports defendant's view that the jury's question appears to be about the formation of the conspiracy.

During closing argument, the prosecutor asserted, "You're not getting an instruction that the agreement had to have been formed on, pick a date, October 21st. October—September 15 or the date of any particular thing. You need to find though [that] there was a union, that these overt acts weren't part of some innocent state of mind of [defendant]. In other words, [defendant]—if you think [defendant] had no idea what was going on, he had no criminal intent regarding any of this, there's no agreement. Okay. If there's no agreement, there's no conspiracy. It's kind of what it boils down to."

Defense counsel argued that "there is one issue and one issue alone in this case. The issue is whether [defendant] entered into a conspiracy with David Chen *to set up* this house of prostitution and to rent those places or whether he's a nice kid, not bright enough to understand what he's doing and did somebody a favor." (Italics added.) Counsel conceded that "[defendant] may have figured out by the time [the video] tape is taken whether there is something exciting going on, but figuring out after the fact that

something he did beforehand does not make him criminally [liable] for what occurred beforehand. He has to have agreed to participate in a conspiracy in order for his participation to be criminal." In all, counsel argued that Chen was in complete control of the business and duped defendant into participating, and just because defendant did something that appears to have furthered the purpose of the alleged conspiracy—e.g., renting the apartment—does not, by itself, prove that he was a co-conspirator.

In rebuttal, the prosecutor argued that defendant was not "duped." "Let's just run with a ridiculous argument. Some point he's got to figure it out, at some point. Now, maybe there is some kind of thought that goes into the overt acts that are alleged in this Complaint. One of the overt acts is at the very beginning of this incident, signing the rental agreement. One of the overt acts is at the very end of this whole thing. It's the day of the arrest when Chen comes up to the apartment and uses a key to get in there. It's this simple—if at any time between the beginning—at the beginning to the end of this you think this guy knew what was going on there and was working with Chen, helping him out, not trying to cancel the lease, going along with it, there's a union of the mental element and the action element."[6] The prosecutor continued, "If all 12 of you agree that one of those overt acts occurred at the time he had that frame of mind to help out Chen, knowing this was a wrong kind of business, if any one of those overt acts occurred, you should find [defendant] guilty."[7]

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[6] The prosecutor alleged four overt acts: (1) around September 2000, defendant signed the rental agreement; (2) around October 26, 2000, Chen supplied towels and condoms to the apartment; (3) around October 26, 2000, Chen had, possessed, and used a key to the apartment; and (4) around October 2000, Chen paid rent on the apartment to defendant.

[7] Defense counsel objected to this argument, and it forms the basis of defendant's claim that the prosecutor was guilty of misconduct.

Counsels' argument reasonably raised the issue of whether defendant could be convicted of conspiracy even if he did not learn about the brothel until after he rented the apartment. Thus, we read the jury's question generally as a request for guidance concerning whether it could view defendant's failure to do something about the brothel once he learned about it as some evidence tending to show a conspiracy—i.e., "a propensity to commit conspiracy." In other words, could jurors consider defendant's knowledge and failure to stop Chen circumstantial evidence of an agreement? The simple answer is yes. "In proving a conspiracy . . . , it is not necessary to demonstrate that the parties met and actually agreed to undertake the unlawful act or that they had previously arranged a detailed plan. The evidence is sufficient if it supports an inference that the parties positively or tacitly came to a mutual understanding to commit a crime. Therefore, conspiracy may be proved through circumstantial evidence inferred from conduct, relationship, interest, and activities of the alleged conspirators before and during the alleged conspiracy." (*People v. Prevost* (1998) 60 Cal.App.4th 1382, 1399.)

Here, there was evidence that (1) defendant agreed to rent an apartment for Chen to use as a massage parlor, and Chen agreed to pay him for it;[8] (2) defendant was the sole legal tenant of the apartment; (3) defendant learned about the brothel at some point either before or after he rented the apartment; and (4) defendant made no effort to distance himself from or disavow the apartment, cancel or transfer the lease, or stop or discourage the illegal activity there. This circumstantial evidence reasonably supports a finding that whenever defendant learned about the expanded use of the apartment as a brothel, he knowingly, willingly, and tacitly agreed to accept it, did not interfere, and continued to

[8] As noted, Officer Vierra noted that the Fair Oaks apartment was not a licensed massage parlor, it lacked any massage tables, and neither Nana Shi nor Li Bin Chen were licensed massage therapists. Moreover, the court took judicial notice of the fact that the purported massage business was not in compliance with the Sunnyvale Municipal Code. Thus, the evidence indicates that defendant initially agreed to run a massage business.

perform his part of their arrangement. Indeed, this is the gist of the prosecutor's argument.

Although the court did not give a pinpoint instruction relating the particular circumstantial evidence to formation of a conspiracy, the court properly and correctly *reinstructed* the jury more generally that "[t]he formation and existence of a conspiracy may be inferred from all circumstances tending to show the common intent and may be proved in the same way as any other fact may be proved, either by direct testimony of the fact or by circumstantial evidence, or by both direct and circumstantial evidence. It is not necessary to show a meeting of the alleged conspirators or the making of an express or formal agreement." (See CALJIC No. 6.12.)

Defendant's proposed response—"mere knowledge that a crime is being committed and the failure to prevent it does not suffice to prove a conspiracy"—is not part of a standard CALJIC instruction on conspiracy, and defendant cites no case where there was a prosecution for conspiracy, and the court gave his proposed instruction or something akin to it. Rather, it appears to have been cobbled together from statements in cases, none of which stand for the entire proposition. In particular, defendant relies on *People v. Weber* (1948) 84 Cal.App.2d 126, *In re Michael T*. (1978) 84 Cal.App.3d 907, and *People v. Braun* (1973) 29 Cal.App.3d 949. All of these cases involved accomplice liability as an aider and abettor.[9] In *Braun,* the court did assert that "mere knowledge of his codefendant's criminal intent without sharing the same does not make a defendant criminally liable either on the basis of conspiracy [citation] or aiding and abetting [citations]." (*People v. Braun, supra*, 29 Cal.App.3d at p. 973.) However, *Braun* does not suggest that knowledge and a failure to act may not be considered circumstantial evidence of an agreement.

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[9] It is settled that "[m]ere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting." (CALJIC No. 3.01.)

Defendant's proposed instruction appear designed to prevent the jury from convicting defendant on the basis of a mens rea of mere knowledge, rather than specific intent, and an actus reus of inaction, rather than agreeing to engage in pimping. However, we believe the court adequately negated this possibility. In reinstructing the jury, the court emphasized and focused the jury on the necessary elements of the offense. In particular, the court again told the jury that "[a] conspiracy is an agreement entered into between two or more persons *with the specific intent to agree to commit the crime of pimping, and with the further specific intent to commit that crime, followed by an overt act committed in this state by one or more of the parties for the purpose of accomplishing the object of the agreement*." (Italics added; see CALJIC No. 6.10.) The court warned that "[e]vidence that a person was in the company of or associated with one or more other persons alleged or proved to have been members of a conspiracy is not, in itself, sufficient to prove that person was a member of the alleged conspiracy." (CALJIC No. 6.13.) The court further warned that "[e]vidence of the commission of an act which furthered the purpose of an alleged conspiracy is not, in itself, sufficient to prove that the person committing the act was a member of the alleged conspiracy." (CALJIC No. 6.18.)

We further note that none of the court's instructions suggested that defendant could be convicted of conspiracy based solely on his knowledge and inaction. Nor did the prosecutor suggest that mere knowledge and inaction were enough. Although the prosecutor's theory was that defendant knew about Chen's plans when he rented the apartment, he alternatively argued that a conviction could be based on evidence that after defendant found out about the brothel, he "*was working with Chen, helping him out, not trying to cancel the lease, going along with it* . . . ." (Italics added.) This argument is consistent with the court's instructions and affirmed that the jury must specifically find

that defendant's response to his knowledge was intended to manifest his agreement to the additional use of the apartment as a brothel.[10]

In sum, we do not find that the court's response to the jury's question was erroneous or inadequate. Moreover, even if we assume for purposes of argument that the court should have also instructed the jury that mere knowledge and inaction are not enough to convict a person of conspiracy, we would find the failure to do so harmless. Given the evidence, argument of counsel, and the instructions, we do not consider it reasonably probable the jury based its finding on mere knowledge and inaction as opposed to findings that defendant had the requisite specific intent and agreed with Chen to commit the crime of pimping. (*People v. Watson, supra,* 46 Cal.2d at p. 836.) Indeed, defendant does not suggest that there is insufficient evidence to support the verdict.

PROBATION INELIGIBILITY

Defendant contends that the court abused its discretion at sentencing when it denied probation on the erroneous assumption that he was ineligible.

The information alleged that defendant was ineligible for probation under section 1203.065, subdivision (a), which, among other things, prohibits granting probation to a person convicted of pimping under section 266h. Although the probation report recommended probation, the court stated, " . . . I believe the recommendation by the probation department in this matter is an illegal sentence. I have reviewed Penal Code section 182, which I think is clear stating that the punishment [for conspiracy] is to be the same and to the full extent of the law as to the target crime, and so therefore the minimum would be three years in state prison."[11]

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[10] For this reason, we reject defendant's claim that the prosecutor's rebuttal argument constituted misconduct, in that it misstated the law.

[11] Section 182, subdivision (a) provides, in relevant part, that persons convicted of conspiracy to commit unspecified felonies "shall be punishable in the same manner and to the same extent as is provided for the punishment of that felony."

After sentencing—and after briefing on appeal was complete—this court filed *People v. Superior Court (Kirby)* (2003) 114 Cal.App.4th 102, in which we held that under the relevant statutes, a conviction for conspiracy to commit pimping does not render a defendant ineligible for probation. (*Id*. at pp. 104-107.) *Kirby* is directly on point and compels a remand for resentencing.

"Probation is an act of clemency that is granted only in the discretion of the judge. [Citations.] An order denying probation may be reversed for failure to consider an application for probation on its merits, unfair hearing procedures, receipt of an ex parte communication, or a clear abuse of discretion. An arbitrary refusal of probation or a denial of probation based on a mistaken belief of ineligibility constitutes reversible error. [Citations.]" (*People v. Read* (1990) 221 Cal.App.3d 685, 689-690; cf. *People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8; *People v. Ruiz* (1975) 14 Cal.3d 163, 168.)[12]

DISPOSITION

The judgment is reversed, and the matter is remanded for resentencing.

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RUSHING, P.J.

WE CONCUR:

_____
PREMO, J.

_____
ELIA, J.

Under section 266h, the punishment for pimping is "imprisonment in the state prison for three, four, or six years." (§ 266h, subd. (a).)

[12] Given our conclusion, we need not address defendant's claim that counsel renedered ineffective assistance in connection with the court's denial of probation.